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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Development of a National Framework to	)	RM-9474
Detect and Deter Backsliding to Ensure	)	
Continued Bell Operating Company Compliance	)	
with Section 271 of the Communications Act	)	
Once In-Region InterLATA Relief is Obtained	)	

REPLY COMMENTS OF STATE COMMUNICATIONS, INC.
IN SUPPORT OF PETITION FOR EXPEDITED RULEMAKING

State Communications, Inc. ("SCI"), by its counsel, hereby submits its Reply Comments in the above-captioned proceeding in support of the Petition for Expedited Rulemaking ("Petition") filed by Allegiance Telecom, Inc. ("Allegiance") on February 1, 1999. Despite the detailed criticism leveled at Allegiance's Petition by Bell Atlantic Corporation ("Bell Atlantic"), SBC Communications ("SBC"), and BellSouth Corporation ("BellSouth") (hereinafter sometimes jointly referred to as the "BOCs"), SCI continues to support this timely initiative, and recommends strongly that the Commission convene a rulemaking to consider the important issues it raises.

DISCUSSION

A. A Rulemaking Is Essential To Ensure BOC Compliance and Competitive Entry

1. Summary of the BOC Oppositions

a. BellSouth and SBC

BellSouth and SBC attack the entire enterprise envisioned in the Allegiance Petition as unnecessary and "unwise."[1] BellSouth asserts that the Allegiance Petition is based on a factually unsupported "expectation of backsliding," and that this is a "flimsy basis" on which to erect a

[1] BellSouth Comments at 2; SBC Comments at 1.

new national regulatory framework.[2] Instead, it is asserted, the facts indicate that the BOCs have expended great sums to open their networks to CLEC participation, and have engaged in serious efforts in various states to establish performance metrics that will ensure compliance.[3] BellSouth calls attention to its "Service Quality Measurements" that purportedly "provide an extremely detailed CLEC-by-CLEC scorecard for tracking the quality of BellSouth's service."[4]

Similarly, SBC points to the various performance measurements Southwestern Bell Telephone ("SWBT") and Pacific Bell ("PB") have negotiated in certain states. In particular, SBC states that SWBT and PB have agreed to 100 performance measurements in the state of Texas, with 1,500 sub-measurements – and that these performance measurements have been voluntarily submitted to state commissions in Arkansas, Kansas, Missouri and Oklahoma.[5] Moreover, SBC notes that 42 performance measurements, with 1,400 sub-measurements, have been agreed to by PB in California and Nevada.[6] Finally, SBC has negotiated 66 performance measurements with the U.S. Department of Justice.[7]

Both BellSouth and SBC assert that the existing FCC and state regulatory measures that are in place now are sufficient to ensure BOC compliance, and that Allegiance has failed to demonstrate the need for any additional action on a national level.[8]

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2 BellSouth Comments at 1.

3 *Id.* at 1-2; SBC Comments at 2-3.

4 BellSouth Comments at 1-2.

5 SBC Comments at 2-3.

6 *Id.*

7 *Id.* at 3.

8 BellSouth Comments at 2, 4 and 5; SBC Comments at 1 and 3.

b. Bell Atlantic

Bell Atlantic takes a slightly more aggressive approach in its comments. Instead of contending that the Allegiance Petition is unwarranted, Bell Atlantic claims that it cannot legally be considered within the confines of the Communications Act of 1934, as amended (the "Act"). Bell Atlantic asserts that the Allegiance Petition is an "attempt to re-write" the Act, and that it is fraught with errors and misconceptions.[9] In particular, Bell Atlantic states that Allegiance (i) has not provided for notice and hearing prior to imposition of penalties; (ii) seeks to impose improper time frames for detection and correction of non-compliance; and (iii) falsely assumes that all checklist items must be offered at TELRIC.

In addition, Bell Atlantic asserts that one of the fundamental premises on which the Allegiance Petition is based, *viz.*, that competition is proceeding at a "glacial" pace, is entirely false.[10] In fact, Bell Atlantic represents, the opposite is true: there is a competitive "firestorm" afoot. As proof, Bell Atlantic notes that the total number of lines "captured" by CLECs in Bell Atlantic territories to date is 1.5 million, including 600,000 resold lines.[11] Moreover, it is claimed, Bell Atlantic's performance is generally compliant, as evidenced by the fact that 90% of CLEC resale orders and unbundled element orders are provisioned in 5 business days or less.[12]

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9 Bell Atlantic Comments at 1-2.

10 *Id.* at 9.

11 *Id.* It is telling that such a large percentage of the lines which Bell Atlantic touts as being "captured" by CLECs are really just resold Bell Atlantic lines. (Witness also the use of the term "captured," as if CLEC-served lines are akin to prisoners of war.) Since Bell Atlantic also participates significantly in the revenue stream from resold lines, this is not particularly impressive. Also, Bell Atlantic did not bother to report the total number of lines it maintains in its territories, and the percentage represented by the 900,000 lines "captured" by facilities-based carriers. Nor did Bell Atlantic indicate how many residential lines have been "captured." Essentially, this is a meaningless statistic, and it does not demonstrate significant incursion of competition in Bell Atlantic territories – in fact, it would seem to indicate the opposite.

12 *Id.*

Bell Atlantic also states that it has complied faithfully with the NYNEX merger conditions, despite Allegiance's criticism, which it views as unfounded.[13]

2. The BOC Comments in Opposition are not Persuasive

a. Existing State and Federal Measures are Insufficient

The BOCs generally claim that there is no demonstrated need for a restructuring of the status quo to ensure compliance after Section 271 entry is achieved. However, SCI submits that Allegiance's Petition has attracted significant support precisely because existing FCC and state regulatory measures, prominently including the lure of Section 271 entry, have proved insufficient to stem the relentless tide of BOC anticompetitive behavior. First, the representation that the BOCs' compliance can be policed effectively by means of negotiated interconnection agreements enforced by state commissions[14] is disingenuous. Although this would be nice in theory, since it allows for an orderly handling of many issues, in practice it is unworkable, because interconnection agreements are rarely, if ever, really "negotiated" between parties of equal standing.

The vast resources of the BOCs allow them to stonewall, delay, and put pressure on CLECs in the context of "interconnection negotiations," generally making for one-sided agreements. Few CLECs have the resources to fight a tooth-and-nail war of attrition with a BOC before state commissions or the FCC, so interconnection agreements rarely, if ever, reflect a fair negotiation process. As a rule, many CLECs simply "shop" for the most favorable agreement in a universe of generally unsatisfactory agreements, and "opt in," even if that agreement does not entirely address the CLEC's concerns. Since a BOC is already dominant in a local market, and a would-be CLEC entrant must place a premium on speed to market to have any reasonable chance to compete, the cards are simply stacked against CLECs from the outset. This is not to say that BOC wrongs cannot be corrected by state commissions in the context of arbitrations – they often

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13 *Id.* at 10.

14 *See, e.g.,* SBC Comments at 3.

are – but this piecemeal "regulation by negotiation" of unequal parties is not achieving the national goal of a competitive local telephone marketplace.

Second, the BOCs' seeming reliance upon performance metrics as the be-all and end-all of achieving a fair, competitive marketplace is misplaced. As is often the case, broad statistical assessments such as BellSouth's Service Quality Measurements or SBC's state-by-state performance measurements and sub-measurements do not tell the whole story. For one thing, artful wording of performance measurements (and artful interpretation of that artful wording after the fact) is tailor-made for the wily BOCs. This, with due respect, is one of the difficulties faced by the Commission in its concurrent review of the Bell Atlantic/NYNEX Merger Order conditions.[15] Since Bell Atlantic was able to wield so much influence over the exact wording of those conditions, it can proceed to behave in a discriminatory and anticompetitive fashion while at the same time claiming compliance with the precise wording of the conditions. For example, although CLECs in Bell Atlantic's territories continue to complain about almost every aspect of the OSS, and it is clear there are significant problems with the interfaces and ordering processes in general, the NYNEX merger conditions only commit to peripheral issues such as testing – not to instituting workable, uniform, economically-viable OSS systems on a strict timetable. Nor did Bell Atlantic's commitment in the NYNEX Merger proceeding to offer performance measures for insertion in interconnection agreements address fundamental interconnection problems that are still extant throughout Bell Atlantic territory.[16]

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[15] *In the Matter of Report of Bell Atlantic on Compliance with the Bell Atlantic/NYNEX Merger Order Conditions,* File No. AAD 98-24.

[16] For example, one commenter in the Bell Atlantic/NYNEX Merger Order proceeding, Freedom Ring Communications, LLC, noted that Bell Atlantic had simply refused to interconnect after an agreement had been negotiated, claiming that it didn't have any facilities available. According to Freedom Ring, it took several months (and the direct intervention of the New Hampshire commission) simply to interconnect. *See* Comments of Freedom Ring at § II.D. Was this a violation of the precise wording of the NYNEX Merger conditions? Is there, practically speaking, any sufficient penalty for such tactics? The point is that the BOCs will invariably seek, and probably obtain, performance metrics with language that can colorably be met without significantly changing their positions toward the CLECs.

This is not to say that the attempt to quantify performance should be abandoned altogether – but it should be treated as just one tool to determine whether a BOC is in compliance, and, as is the case with all statistical conclusions, performance measurement reports should be regarded with a healthy skepticism. For example, what does it really mean when Bell Atlantic reports that it provisions the average resale and UNE order in 5 business days or less? Since this experience does not square with most CLECs' experience, it probably means that Bell Atlantic is counting differently: most certainly, Bell Atlantic is not counting from the date of receipt of the CLEC order. But this fails to count all of the time-consuming miscues, mistakes, delays and repetitions eventuated by Bell Atlantic's unworkable OSS and insufficient staffing. In other words, even if Bell Atlantic's assertion is entirely accurate within its terms, this essentially says nothing meaningful about the "real picture" of ordering and provisioning.

Moreover, as inadvertently pointed out by SBC in its comments, performance measurements (and sub-measurements) vary widely from jurisdiction to jurisdiction. Many CLECs, however, operate on a multistate basis, and it is exceedingly difficult to track all of the different BOC performance levels to which they are entitled. The very diversity of these measures argues convincingly for the necessity of a national default minimum set of performance standards.

b. There is No Need to Rewrite the Act

Contrary to Bell Atlantic's stated position, there is no need to rewrite or amend the Act in order to issue a rulemaking based on Allegiance's Petition. The various complaints that Bell Atlantic has voiced, such as the need to have notice and a hearing, and the timeframes for compliance monitoring and application of penalties, can all be addressed by commenters in the rulemaking proceeding. The point of a Petition for Rulemaking is not to set forth the absolute final state of the rule to be adopted, but rather to provoke a meaningful discussion that will address perceived regulatory problems, and arrive at a reasoned conclusion. Accordingly, Bell Atlantic's cavils are not fatal, but should be folded into a national discussion pursuant to a Notice of Proposed Rulemaking ("NOPR") from the Commission. If "tune-ups" are needed to

Allegiance's stated position, they will most certainly be raised and considered in that proceeding. If the Act is offended by any part of Allegiance's Petition, which SCI does not concede, this can be addressed by the Commission in its NOPR, and it is not fatal to going forward at this point.

The Notice of Proposed Rulemaking should seek comments on whether the Commission in fact has the required authority to fashion creative remedies such as the "New York" approach of compelling reduced prices for UNEs, or other remedies, in the event of non-compliance. SCI believes that the Commission has the requisite authority, but the relatively novel issue bears further discussion. The complex question of penalties, remedies and enforcement should be a major part of the discussion, since it is clear that the BOCs have not been significantly deterred from their destructive pattern of conduct by current means. The question is whether the Commission can find a way to "do what it takes" to ensure compliance, short of withdrawing Section 271 approval once it is already granted. This may involve stiff and certain monetary penalties on a scale not hitherto envisioned, as well as more innovative approaches calculated to deflect BOC anticompetitive momentum. This does not require rewriting the Act, but rather arriving at a better understanding of what is possible under the Act.

B. The Commission Should Read Checklist Item 3 to Include Access to Inside Wiring

Both BellSouth and Bell Atlantic stress in their Comments that the Commission should not address the inside wiring issues raised by Allegiance in any NOPR that might be issued.[17] The BOCs claim that these issues are already being addressed in other proceedings before the FCC and in various states, and there is no need to consider them here.

On the contrary, CLEC access to inside wiring is an *essential issue* that does lend itself to inclusion in a default minimum national regulatory framework. BOCs seek to maintain their monopoly on inside wiring in multi-unit dwellings and other structures in order to exclude CLECs from accessing customers served by those wires. This strategy can play itself out in a number of ways (and all of them are deleterious to CLECs). One implication of this refusal to

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17 *See* BellSouth Comments at 5-6; Bell Atlantic Comments at 7.

allow CLEC access to inside wiring is that the BOC must perform all necessary maintenance on inside wires, and CLECs cannot do any maintenance, even for their own customers. SCI has experienced repetitive and significant difficulties pertaining to customers in buildings where inside wiring is controlled exclusively by BellSouth. Typically, when a SCI customer experiences difficulties which are traced to inside wiring, BellSouth technicians refuse to make repairs – on the basis that this is a SCI customer, and is therefore SCI's responsibility! Of course, SCI cannot access the wiring, so SCI cannot make the repair itself. Even though SCI has offered to enter into an agreement with BellSouth pursuant to which SCI would be responsible for the expense of any repairs made by BellSouth technicians on inside wiring serving SCI customers, and has proposed that BellSouth technicians be furnished USOC codes which state that SCI will be financially responsible, this has not been accepted by BellSouth. The end result is that SCI's customers' lines are *not* repaired, and SCI loses the customer, most likely to BellSouth.

This plainly should not be countenanced – and incorporating a requirement that BOCs allow access to inside wiring, or face stiff penalties, may ultimately result in a more level playing field (particularly in urban areas) and greater consumer choice. As stated above, simply because this issue is being considered elsewhere does not preclude the setting of a minimum, universally-applicable standard in the context of a new rulemaking proceeding.

C. The Commission Should Not Interfere With State Efforts, So Long as Minimum Requirements are Met

SCI agrees in part with the Comments submitted by the New York State Department of Public Service ("NYDPS"), which contend that the FCC should not put itself in the position of interfering with concurrent state efforts to ensure compliance after Section 271 entry. The NYDPS has taken a leadership role in many aspects of the developing relationship between CLECs and BOCs, and it should continue to do so. Other active state commissions should also

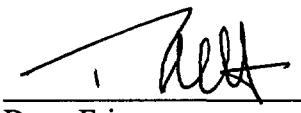
be able to impose their compliance requirements as well. In some cases, issues are colored by the facts extant in a given locality, and the state commission is best armed to address them.

This being said, however, SCI nevertheless firmly believes that the FCC should establish a national "floor" for fundamental BOC performance issues that may not be undercut by any state action. Since there are many common aspects of the relationship between BOCs and CLECs that do not vary appreciably from jurisdiction to jurisdiction, and would benefit from a singular approach, it is appropriate for the FCC to assert its authority in this manner. State requirements which *exceed* this basic level are permissible, and should be encouraged. Beyond the fundamental level, states should be free to impose additional compliance requirements and performance measures without undue federal interference.

CONCLUSION

Allegiance's Petition is timely because it seeks to pull together all of the disparate efforts of state and federal regulators to rein in BOC anticompetitive behavior, and focus them in a way that is most likely to succeed: by establishing a nationally-applicable default performance framework, with swift and certain penalties for non-compliance. Accordingly, even if the issues addressed by Allegiance in its Petition are similar to other issues being considered elsewhere, this does not demonstrate that Allegiance's Petition is redundant or duplicative. On the contrary, it is the unified focus of the Allegiance Petition that makes it an attractive approach. The BOCs' objections fail to demonstrate that there is no need for a rulemaking as envisioned by Allegiance, nor do they argue persuasively that the actions contemplated in the Petition would be inconsistent with the Act. The sorry history of BOC/CLEC interaction, and the stalled state of local competition clearly indicates the need to a unified, energetic approach by federal regulators to ensure compliance with the Act. SCI urges the Commission to convene a national discussion on these important issues by issuance of a Notice of Proposed Rulemaking before the fact of Section 271 entry changes the picture entirely.

Respectfully submitted,



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Dated: March 23, 1999

CERTIFICATE OF SERVICE

I, Sonja Sykes-Minor, hereby certify that on this 23rd day of March 1999, copies of the foregoing REPLY COMMENTS OF STATE COMMUNICATIONS, INC. IN SUPPORT OF PETITION FOR EXPEDITED RULEMAKING; RM 9474, were served via Messenger** or U.S. Mail, postage prepaid, upon the parties on the attached service list:

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